



FEDERATION INTERNATIONALE DES MUSIENS
INTERNATIONAL FEDERATION OF MUSICIANS
INTERNATIONALER MUSIKERFÖDERATION
FEDERACION INTERNACIONAL DE MUSICOS

**FIM COMMENTS ON THE GREEN PAPER
"MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21st CENTURY"**

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The International Federation of Musicians (FIM) is a non-governmental organisation representing unions, guilds and associations of musicians in over 70 countries throughout the world and uniting a total of several hundreds of thousands of musicians. The FIM's European Group brings together unions from most of the European Union's Member States, the European Economic Area and Switzerland, who work both in the performing arts and recorded music sectors.

This document is aimed at providing FIM arguments in reply to the questions that the European Commission is asking civil society within the scope of its Green Paper on the future of labour law in Europe. Some questions have been deliberately ignored since they do correspond to the major concerns of professional music performers represented by our Federation.

1. What would you consider to be the priorities for a meaningful labour law reform agenda?

The question of *atypical* labour requires specific attention. In the cultural sector and, more particularly, that of the media and performing arts, labour relations are often based on short-term contracts drawn up for multiple employers or "co-contracting parties" who are sometimes difficult to identify. This flexibility makes it necessary to ensure security through more structured professional paths. Depending on the country -or even in the same country-, identical services exercised in similar conditions can, according to the case, be covered by an employment contract or a provision of service contract. More often than not, recourse to a service contract results from the desire of the employer to bypass labour law. The practical consequences for workers are generally to significantly limit possibilities for access to social welfare benefits (retirement pension, unemployment, health, paid leave).

So as to avoid this pitfall, FIM recommends an inclusive approach which aims to guarantee collective and human rights for all workers, whether employees or "self-employed", (in particular the right to negotiate and benefit from collective agreements).

Such an approach would go towards replacing the social dimension at the heart of the internal market and would limit discriminations between workers "protected" by an employment contract and those without any protection whatsoever.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and security of employment and a reduction in labour market segmentation? If yes, then how?

Flexibility is already an essential element in the organisation of our sector. We feel that it is vital that labour law, in particular via collective agreements, should take more account of professions whose organisational infrastructure is already ultra-flexible (particularly with regards to so-called "*casually employed*" professionals). Without any compensatory mechanisms, for numerous artists and professionals, this flexibility incurs situations of job insecurity. From our point of view, the question is not one of increasing flexibility but of enhancing protection for

workers subject to this type of work organisation. In our experience, the sole aim behind requests for improved flexibility is to reduce wage costs without compensatory mechanisms. This can only result in depriving currently covered workers of protection without making any contributions to the reduction in labour market segmentation.

Music performers are particularly sensitive to questions of flexibility. Most of them work on the basis of short-term contracts, for multiple employers with significant risk of periods of unemployment. This flexibility is inherent to the profession. On the other hand, security needs are high, since flexibility is rarely accompanied by sufficiently protective mechanisms. With the exception of most of permanent ensembles, performers are hired for productions of variable duration. Moreover, the paid artistic work is always preceded by individual preparation which is seldom taken into account.

How does one finance occupational transition? The "flexicurity" system set up in Denmark is often quoted as an example which incorporates real hand-in-glove mechanisms that accompany workers during transitional periods in exchange for facilitating redundancy. It is a sort of mutualisation which releases the company from its responsibility by transferring the cost to the community. FIM does not view this model in any negative way, provided that the balance between flexibility and security is respected. However, it does wonder about whether such a system is transposable to other Union countries. Denmark's financial resources are above the European average and tax pressure is high. All Member States do not have such significant budgetary and fiscal margins for manoeuvre. The first thing which would need to be done, therefore, is to carefully examine all the economic aspects linked to the implementation of such mechanisms.

In other professional situations, promoting flexibility may lead to ineptitudes. Such is the case when an orchestra is tempted to place musicians in a situation of uncertain contract. If they are to reach levels of excellence, orchestras need musicians of talent, but they also need long-term collective work if they are to forge a distinctive "sound". In this case, recourse to musicians who are not permanent members of an orchestra goes against its very mission.

5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

In FIM's sector of activity, this proposal seems highly relevant with regards to workers whose activity requires a great deal of flexibility and alternating periods of often intense work and periods of unemployment. Too few European countries have implemented efficient mechanisms for accompanying professionals in these sectors. Known as the "*intermittence du spectacle*", the French system allows continuous usage of short-term contracts in exchange for covering periods of unemployment and providing suitable social welfare benefits, a regime which proves to be very efficient.

6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transition between different contractual forms to support upward mobility over the course of a fully active working life?

Our sector of activity is marked by a great need for mobility and adaptability. Consequently, FIM considers that access to training and accompanying transitions over the course of a working life are an essential right which should be prescribed by law and worked out by collective agreements. The responsibility of each co-contracting party or employers of workers recruited on short-term contracts needs, however, to be defined. We feel that mutualisation is the only realistic solution. All the sector structures should contribute to a permanent training fund to which all sector workers should be eligible (regardless of the legal framework in which they exercise their activity). Such a system already exists in many European countries. This fund should be enriched by voluntary but also mandatory contributions insofar as worker adaptability is beneficial to the whole industry.

7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

FIM feels that the ambiguity that is still present with regards to the respective boundaries in the status of employee and self-employed in Europe is harmful. We think that it is desirable that member States and Union institutions should address this fundamental issue. Debates organised around the proposed directive on services highlighted the problem of the self-employed who came under a "grey area": those who are without a contract of employment but who do not work in conditions of self-employment either, or have sufficient economic control to be considered as service providers. Moreover, in a sector which is strongly structured around short-term contracts with multiple "employers", self-employed workers do not even come under the category of self-employed with a link of subordination as defined by the Commission.

In practice, the distinction between employee and self-employed work is often artificial and above all has the great advantage, for "employers", of exonerating them from social contributions and other obligations by purchasing a "turnkey" service. Such a system is only conceivable if it coincides with what the Green Paper describes as *"a decision, freely taken, to work as self-employed despite a lesser level of protection, in exchange for a more direct control over the conditions of employment and remuneration"*. Unfortunately, without any suitable legal or convention framework, many music performers work in Europe as self-employed in conditions which do not correspond to this freely taken decision. Consequently, this creates a situation of artificial and unhealthy competition between workers covered by a protective legal framework (in particular for nationals of countries who apply labour law to these work relations) and those who are not covered by any specific legal framework, where the qualification of the contract is left to the sole appreciation of the parties.

It is significant that many people systematically assimilate "freelance" workers with self-employed workers, even when the latter work in an organised department and carry out services (albeit artistic) in a relationship of subordination to the principal without any real economic independence.

FIM does, however, recognize that, on account of different cultural, legal, fiscal or social traditions, cultural workers from certain European countries may sometimes prefer keeping a self-employed status rather than having a presumption of employment contract applied, since they are in a position to benefit from real compensations from such qualification. Favoured by employers, collective bargaining also plays a fundamental role in this case. Consequently, it should be kept in mind that such people are workers in the full sense of the term and are eligible for collective representation, collective agreements and all worker rights recognized by the International Labour Office and the European Court of Justice. It would not be normal for such workers to be purely and simply subjected to competition law, since their independence is merely of a cosmetic nature.

Consequently, FIM does not consider appropriate to question the competence of states in determining the respective scope of working contracts and self-employment, but rather proposes that the European Commission undertakes a process of reflection aimed at recognizing a clear distinction between the category of "workers" and that of "service providers" in all Member States, and ensuring that such a distinction is recognized by all. The category of workers being subdivided into employees and "self-employed" economically dependents. The benefits of labour prerogatives (in particular collective bargaining) would, therefore, no longer depend on the existence of a work contract but on the fact of being a worker.

Such measures would indeed decompartmentalize the labour market.

8. Is there a need for a "floor of rights" dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

This issue follows on logically from what went before. From the moment that a category of workers is legally recognized, it is essential to see that it has a "floor of rights" although we would prefer the term "glove of rights", with particular bearing on working conditions. Depending on national traditions, such a glove may essentially be

defined by the law and/or by collective agreements. This "glove of rights" must, however, in no case constitute a "sub-status" with prerogatives that are inferior to those granted to employees. If such were not the case, labour market segmentation would increase and strong tensions would develop, resulting in a reduction of currently recognized prerogatives.

In our sector, the need for such a floor of rights might be illustrated in many ways. We outline just two examples here:

- our sector is characterised by marked variations in work which can alternate between more or less intense periods of activity. Against such a backdrop, it is crucial to guarantee a legal framework which protects workers, including the self-employed, against abusive demands concerning the number of hours worked at a stretch that might represent a threat for their health;
- directive 2003/10 CE which protects workers from excessive exposure to noise was designed from a traditional industrial blueprint. Since the "co-contracting parties" of self-employed workers are not legally employers of this non-permanent staff, they are not responsible for seeing that this directive is properly applied. And yet self-employed workers are subjected to the same noise as their employee counterparts. It would therefore be logical for such a provision to protect all workers, regardless of their legal status.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?

Yes. Multiple or triangular employment relationship is developing in the live performance sector. By imposing a change from employment to commercial relationship, many principal contractors try to circumvent their responsibility as employers to the detriment of performers.

In the case of subcontracting, the principal contractors should be held liable for the obligations of their subcontractors who are under their sole dependence.

11. How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Commission?

The example set out in the previous question illustrates our fear that there may be deregulation in working time. There is a great deal of economic pressure bearing on performing arts workers for three main reasons:

- the sector is highly volatile, and made up of numerous small structures over which it is difficult to exercise effective control;
- it is almost impossible (except for an artist of great renown or a technician with highly sought-after skills) to negotiate working conditions on a peer to peer basis;
- the worker is generally subjected to an intense workload over a very short period of time (in particular as a result of the high cost of hiring a complete set for a production).

It is therefore vital for legislation to fix absolute limits to ensure workers' health and safety. From this point of view, we feel that overriding mechanisms such as the "opt-out" clause put forward in the draft working time directive are a very poor solution. In our sector, it is highly likely that such an exception would become the rule, or any production potentially giving rise to an exceptional situation that would make such waiving possible.

Abandoning the opt-out would have the advantage of forcing employers to improve the way they plan the organisation of their work and, why not, look for more sources of financing, to create jobs in the sector.

In addition, musicians spend many hours between rehearsals and performances which are unpaid (without mentioning of rehearsals which are not paid!). During these periods known as "captive time", musicians are unable to undertake other engagements and often not long enough to allow them to return home. Equally, many musicians who work on touring shows spend long periods travelling on free days without financial compensation nor additional free days. This captive time should be financially compensated and travel on free days should count towards working time when calculating free days.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of "worker" in the EU Directives in the interest of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

This question touches on a basic issue, particularly in a sector of activity marked by significant geographical mobility for workers. FIM is extremely attached to the free movement of works and artists provided its real aim is not to get round legal and agreement provisions that have been set up to protect workers.

It does not appear realistic today to envisage a single legal mechanism for sector workers. On the other hand, it is highly desirable to guarantee all workers access to a set of rights, regardless of their legal status.

We feel that it is necessary to enhance convergence when defining "workers" in European Directives, but clearly not with the aim of extending the country of origin principle to worker mobility. Implementing such a principle could, in a given country, result in placing professionals in competition with each other whose work is governed by laws, or even legal statuses that are different with variable costs for the "employer". Even if they had to be classified as self-employed, sector workers could not be regarded as service providers who controlled their activities. Placing them in a situation of competition while leaving the "employer" the freedom to opt for a more or less "open" legal framework would result in strong pressure being exerted on remunerations and would directly jeopardise collective agreements that were the fruit of many years of social dialogue.

On the contrary, we believe that workers who exercise their activity in a country other than the one to which they are legally attached should be able to benefit from more favourable working conditions if these are in force in the country where they go to, as well as more efficient social security coordination infrastructures, so as not to be penalised vis-à-vis nationals. Respecting these principles would foster mobility based on search for talent and skills rather than on irresistible pressure on remunerations.

13. Do you think it is necessary to reinforce administrative cooperation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?

Such is indeed our point of view. Moonlighting or dissimulated work is a phenomenon which is objectively harmful to the European economy and which needs to be combated, particularly against the backdrop of an enlarged Europe and increased mobility within the Union's borders.

The culture and media sector is particularly exposed to this phenomenon on account of the high degree of fragmentation within the industry, the extremely mobile character of productions and workers and the multiplicity of more or less protective statuses. Consequently, enhanced cooperation is required between the different European administrations, but there is also a need for dedicated corps of labour inspectors to be set up or strengthened.

FIM also recalls the eminent role played by union and professional organisations in the fight against moonlighting, aimed at combating illegal practices which result in labour market distortions and a weakening of collective agreements. Unfortunately, our members can often only deplore the lack of means available in this field.

FIM would like to see social partners (in particular employers who have a lot to gain from markets which are not distorted by competition from unscrupulous "colleagues") associated by Member States to a policy of efficient control of moonlighting.

14. Do you consider that further initiatives are needed at EU level to support action by the Member States to combat undeclared work?

Other initiatives could be implemented, in particular by the European Commission, which might undertake actions enhancing awareness at state level and bring together social partners (in particular via sectoral social dialogue committees) with a view to drawing up proposals of action that take into account the needs and specific natures of the different sectors.

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